Supreme Court, U.S.
FILED
OCT 20 1999
OFFICE OF THE CLERK

No. 99-474

IN THE
Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF NONPROFIT ORGANIZATIONS, AMICI CURIAE: CENTER FOR CONSTITUTIONAL RIGHTS, CENTER FOR INT'L ENVIRONMENTAL LAW, CONSUMERS CHOICE COUNCIL, GLOBAL EXCHANGE, HUMANE SOCIETY OF THE U.S., LOS ANGELES BURMA FORUM, NEW ENGLAND BURMA ROUNDTABLE, SUSTAINABLE AMERICA, UNITARIAN UNIVERSALIST SERVICE COMM., WOMEN'S DIV.—GEN. BD. OF GLOBAL MINISTRIES—UNITED METHODIST CHURCH,

(Listing Continued on Inside Cover)

IN SUPPORT OF THE PETITION

DEBORAH ANKER
Counsel of Record
HARVARD IMMIGRATION & REFUGEE CLINIC
197 Friend Street - Suite 800
Boston, MA 02114
(617) 371-1234

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

ALLIANCE FOR DEMOCRACY, AMERICAN LANDS ALLIANCE, ARISE RESOURCE CENTER, ASIA PACIFIC CENTER FOR PEACE & JUSTICE, AS YOU SOW FOUNDATION, BOSTON MOBILIZATION FOR SURVIVAL, CENTER FOR LABOR & COMMUNITY RESOURCES, DEFENDERS OF WILDLIFE, DELTA COUNTY ALLIANCE FOR DEMOCRACY, DICTATOR WATCH, DOMINICAN SISTERS OF HOPE, EARTHRIGHTS INTL., EAST TIMOR ACTION NETWORKS/U.S., EDMONDS INST., 8TH DAY CENTER FOR JUSTICE, FREE BURMA COALITION, FREE BURMA—NO PETRO DOLLARS, HUMANE SOCIETY INTL., INST. FOR AGRICULTURE & TRADE POLICY, INTERNATIONAL COMMITTEE OF LAWYERS FOR TIBET, INTL. LABOR RIGHTS FUND, INTL. RIVERS NETWORK, LONG ISLAND PROGRESSIVE COALITION, JEWISH LABOR COMMITTEE, MERRIMACK VALLEY PEOPLE FOR PEACE, NATIONAL ASSOCIATION FOR SOCIALLY RESPONSIBLE ORGANIZATIONS, PENNSYLVANIA CONSUMER ACTION NETWORK, PHILADELPHIA BURMA FORUM, PROJECT MAJE, PROJECT UNDERGROUND, RT. REV. THOMAS SHAW, EPISCOPAL BISHOP OF MASSACHUSETTS, RUCKUS SOCIETY, SEATTLE BURMA ROUNDTABLE, UNITED FOR A FAIR ECONOMY, URSULINE SISTERS OF TILDONK, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE & FREEDOM

QUESTIONS PRESENTED

Did the Court of Appeals err in failing to consider the importance of international human rights law and principles as authority for the states to adopt a selective purchasing scheme? Did the Court err in overlooking the broad impact on state laws and long standing practices dating back to the slave trade?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT	1
REASONS FOR GRANTING THE WRIT	1
I. THE RIGHT OF STATES TO LEGISLATE IN ACCORDANCE WITH U.S. OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW IS AN IMPORTANT MATTER OF FEDERAL LAW WHICH IS UNDERMINED BY THE DECISION OF THE COURT OF APPEALS	1
A. International treaties to which the United States is a party create binding obligations acknowledged in U.S. law to act affimatively to promote respect for human rights	2
B. States of the United States have sovereign authority to condition public spending on international human rights principles as an aspect of their right to legislate for public morality	5
C. International Human Rights Conventions, adopted into U.S. law by ratification, reserve substantial responsibility for enforcement of human rights norms to the States	7
D. Customary International Law (CIL), as part of the federal common law, provides further authority for State legislation intended to promote universal respect for human rights and suppress its violations	9

TABLE OF CONTENTS—Continued

	Page
E. The First Circuit Court of Appeals was unduly influenced by the European Union in its consideration of international law; a full consideration of U.S. obligations cannot be limited to one treaty	11
II. THE COURT OF APPEALS' DECISION UNDERMINES A TRADITION OF STATES' INVOLVEMENT IN LEGISLATING TO PROMOTE HUMAN RIGHTS, DATING BACK TO STATE PROHIBITION OF THE SLAVE TRADE	12
III. THE COURT OF APPEALS DECISION PLACES THE CONSTITUTIONALITY OF MANY STATE AND LOCAL LAWS IN DOUBT, AND MAY LEAD TO A DRAMATIC INCREASE IN INAPPROPRIATE LEGAL CHALLENGES	14
A. The Court of Appeals decision that selective purchasing laws are unconstitutional is an important question of federal law because of the large number of state and local selective purchasing laws that could be affected	14
B. The Court of Appeals' reliance on the complaints of foreign countries presents an important question of federal law because foreign countries have complained that a wide variety of state and local laws constitute trade barriers	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)	10
Fox Valley and Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.), *cert. denied*, 498 U.S. 820 (1990)	10
Maro Saldana v. Wyoming, 846 P.2d 604 (Wyo. 1993)	5
NAACP v. Clairbourne Hardware Co., 458 U.S. 886 (1982)	12
Nash v. Trustees of Boston University, 946 F.2d 960 (1st Cir. 1991)	10
National Foreign Trade Council v. Andrew S. Natsios et. al., 181 F.3d 38 (1st Cir., June 22, 1999)	13
Negoski v. Country Life Ins. Co., 843 F.Supp. 372 (N.D. Ill. 1993)	10
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	5
Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)	10
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)	11
The Paquete Habana, 175 U.S. 677 (1900)	9, 10
Trap Rock Industries, Inc. v. Kohl, 284 A.2d 161 (N.J. 1971)	5
Trajano v. Marcos (Marcos Estate I), 978 F.2d 493 (9th Cir.), *cert. denied*, 508 U.S. 972 (1993)	10
United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820)	10
Xuncax v. Gramajo, 886 F.Supp. 162 (D. Mass. 1995)	10
CONSTITUTIONAL PROVISIONS	
U.S. CONST. art. I, § 9, cl. 1	12
STATUTES	
19 U.S.C. § 3512	20
22 U.S.C. § 2304	5

TABLE OF AUTHORITIES—Continued

	Page
Mass. Gen. Laws Ann. Ch. 32, § 23(1)(d)(iii), *approved* April 4, 1983	13
Uruguay Round Agreements Act (URAA) of 1994, P.L. 103-465, § 102, 19 U.S.C. § 3512	11
TREATIES AND CONVENTIONS	
Constitution of the International Labor Organization, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35, *amended by* 7 U.S.T. 245, T.I.A.S. No. 3500, 191 U.N.T.S. 143 (1953), 14 U.S.T. 1039, T.I.A.S. No. 5041, 466 U.N.T.S. (1962), U.S.T. 3253, T.I.A.S. No. 7987 (1972)	8
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc., No. 100-20, 102nd Cong., 2d Sess. V-vi (1988), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. 39/51 (1984), *entered into force*, June 26, 1987	4
Convention Concerning the Abolition of Forced Labor (No. 105), *entered into force*, Jan. 10, 1957, 320 U.N.T.S. 291, *ratified* May 14, 1991	3
Declaration Concerning the Aims and Purposes of the International Labor Organization, Annex to the Instrument for the Amendment of the Constitution of ILO Constitution, *entered into force*, Apr. 20, 1948, *reentered into force for the United States*, Feb. 18, 1980, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 104	3
Understanding No. 5 of the United States to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486 (1992)	8
United Nations Charter, arts. 55, 56 Stat. 1031, T.S. 993, *entered into force*, Oct. 24, 1945	3
Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948)	3
MISCELLANEOUS	
132 Cong. Rec. S12533, 99th Cong., 2nd Sess. (1986)	14

TABLE OF AUTHORITIES—Continued

	Page
137 Cong. Rec. S5728, 102nd Cong., 1st Sess. (1991) (STATEMENT OF SEN. HELMS)	4
Amnesty International, "Myanmar: 10th Anniversary of Military Repression" (August 7, 1998)	6
Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit	15, 20
Charles McLean Andrews, "The Boston Merchants and the Non-importation Movement" (1968)	12
Hearing of the Ad Hoc Subcommittee on Human Rights Conventions of the Committee of Foreign Relations, Feb. 23rd, 1967	4
Hearing, Subcommittee on Labor and Public Welfare on S.J. Res 117, 84th Cong., 2d Sess. (1956) (statement of Asst. Secretary of Labor Philip M. Kaiser)	8
Howard N. Fenton, III, "The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions, 13 Nw. J. Int'l L. & Bus. 563, 568-569 (Spring 1993)	13
James Gray Pope, "Republican Moments: The Role of Direct Popular Power in the American Constitutional Order", 139 U. Pa. L. Rev. 287	12
Kevin P. Lewis, "Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation", 61 Tul. L. Rev. 469, 471-472 (1987)	13
Louis Henkin, *The Age of Rights* 2 (1996)	6
Matthew Porterfield, "State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism", 35 Stan. J. Int'l Law (1999)	12
Restatement (Third) of Foreign Relations Law § 102 (1987)	9, 10
Restatement (Third) of Foreign Relations Law § 702, cmt. o (1987)	10
THE FEDERALIST No. 43 (James Madison)	12

TABLE OF AUTHORITIES—Continued

	Page
U.S. Department of Labor, Report on Labor Practices in *Burma* (Sept. 1998)	7
U.S. Embassy, Rangoon, *Foreign Economic Trends Report—Burma* (1997)	7
U.S. State Department Report to Congress (June 13, 1997)	6

STATEMENT OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

Amicus curiae are engaged in aspects of advocacy for human rights, labor rights, and environmental justice in Burma and elsewhere, which are threatened by the decision of the Court of Appeals.* They include religious and voluntary organizations with over ten million members active at the local, state, national and international levels. The parties are concerned with the issues raised by this case regarding the legal authority of states to use selective purchasing to fulfill obligations of international law and to meet the demands of public morality reflected in international human rights principles. Specifically, *amici curiae* are concerned that the Court of Appeals failed to properly consider international human rights obligations, and the effect of the decision on a broad range of state and local activities in which *amici* have interests.

Amici curiae have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Counsel to the respondent, National Foreign Trade Council, has given their consent to the filing of this *amicus* brief.

REASONS FOR GRANTING THE WRIT

I. THE RIGHT OF STATES TO LEGISLATE IN ACCORDANCE WITH U.S. OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW IS AN IMPORTANT MATTER OF FEDERAL LAW WHICH IS UNDERMINED BY THE DECISION OF THE COURT OF APPEALS

The Supreme Court should grant certiorari because this case involves significant international human rights

---

* As required under Supreme Court Rule 37.6, counsel on this brief disclose that counsel for a party did not author any part of this brief. Funding for preparation of this brief was provided through the institutional support of Harvard Law School Human Rights Program, which is a program for research and clinical legal education.

obligations that were completely discounted by the court below. The Court of Appeals failed to consider the importance of these obligations, only taking cognizance of certain disputed obligations under international trade law. As a result, the ruling of the Court will have a disruptive effect on a legitimate basis of state legislative authority. Further, by giving short shrift to the violations of human rights in Burma, the Court neglected the essential link between the law and the state's legislative authority.

International human rights law enables state legislative authority on three grounds. First, states have sovereign powers to legislate for the protection of public morality, of which human rights forms a part (*see* § B, *infra.*). Second, as adopted into U.S. law through Senate ratification, states have an explictly recognized role in the implementation of laws (*see* § C, *infra*); and third, to the extent it is customary international law, international human rights law (IHRL) is incorporated into federal common law providing separate grounds for state legislative jurisdiction (*see* § D, *infra.*). In its decision, the Court of Appeals dismissed these considerations, improperly emphasizing one component of international obligations and ignoring the body of IHRL (*see* § E, *infra*).

A. International Treaties to Which the United States Is a Party Create Binding Obligations Acknowledged in U.S. Law to Act Affirmatively to Promote Respect for Human Rights

The constitutive documents of international human rights law (IHRL) commit the United States to promote universal human rights and to take measures to suppress egregious violations of human rights. Articles 55 and 56 of the U.N. Charter require members of the U.N. to "take joint and separate action" for the achievement of "universal respect for and observance of, human rights and fundamental freedoms for all . . .". United Nations

Charter, arts. 55, 56 Stat. 1031, T.S. 993, *entered into force,* Oct. 4, 1945. Moreover, the Universal Declaration of Human Rights (UDHR), the cornerstone of IHRL, calls on member states to take "progressive measures, national and international, to secure universal and effective recognition and observance [of human rights] . . .". Universal Declaration of Human Rights, G.A.Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Finally, the constitutive documents of the International Labor Organization (ILO) require member states to implement policies to bring about universal respect for basic rights, affirming that "all national and international policies and measures, in particular those of an economic and financial character" are acceptable "only in so far as they may be held to promote and not to hinder" social justice. Declaration Concerning the Aims and Purposes of the International Labour Organization, Annex to the Instrument for the Amendment of the Constitution of ILO Constitution, *entered into force* April 20, 1948, *re-entered into force for the United States,* Feb. 18, 1980, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 104.

International treaties prohibiting slavery and slave-like conditions, including forced labor and torture, clearly indicate that enforcement of human rights is the concrete obligation of every signatory or member, not simply a diffuse commitment of international organizations. In ratifying these treaties, the U.S. has committed itself to the eradication of such violations practiced in Burma.

Thus, for example, ILO Convention (No. 105) Concerning the Abolition of Forced Labor outlaws forced or compulsory labor in five specific circumstances, which have been violated by the Burmese military regime. (ILO 105, *entered into force,* Jan. 10, 1957, 320 U.N.T.S. 291, *ratified* May 14, 1991.) Among them:

> Each Member of the ILO which ratifies this Convention undertakes to suppress and not to make use of any form of compulsory labour . . .
>
> (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
>
> (b) as a method of mobilising and using labour for purposes of economic development;
>
> (c) as a means of labour discipline . . . .

(Art. 1). Comments made by senators in support of the ILO Convention indicate an acknowledgment of an implicit extraterritorial purpose. In arguing for passage of ILO Convention No. 105 in 1967, former Supreme Court Justice and Ambassador Arthur Goldberg reasoned, "[w]hen countries are permitted to use forced labor to produce goods and services, that, of course, places our own country at a great competitive disadvantage." (Hearing of the Ad Hoc Subcommittee on Human Rights Conventions, of the Committee of Foreign Relations, Feb. 23, 1967.) Prior to Senate ratification in 1991, the chair of the Senate Foreign Relations Committee, Jesse Helms, explained that the ILO Convention authorizes policy measures to suppress forced labor outside of the territory of the United States. (137 Cong. Rec. S5728, 102nd Cong., 1st Sess. (1991) (statement of Sen. Helms).

The Convention Against Torture (CAT) also requires States Parties to take measures to prohibit acts of torture and cruel, inhuman or degrading treatment or punishment *at home or abroad*. It explicitly requires states to punish torturers (or extradite them to a state that will do so) no matter what the country of origin. (Art. 4, CAT, S. Treaty Doc. No. 100-20, 102nd Cong., 2d Sess. v-vi (1988), G.A. res. 39/46, annex, 39 U.N. GAOR

Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force*, June 26, 1987, *ratified* 1992).

Recognizing these obligations, Congress codified the observance of human rights as a principal goal of foreign policy:

> The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations . . ., promote and encourage increased respect for human rights and fundamental freedoms throughout the world . . . . Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

22 U.S.C. § 2304(a)(1).

B. States of the United States Have Sovereign Authority to Condition Public Spending on International Human Rights Principles as an Aspect of Their Right to Legislate for Public Morality

In contrast to the enumerated powers of the federal government, the powers of states are plenary. *See, e.g., Maro Saldana v. Wyoming*, 846 P.2d 604, 646 (Wyo. 1993). States may use their purchasing power to advance social goals, which include limiting state business to market actors that comport with standards of integrity and public morality. *Trap Rock Industries, Inc. v. Kohl*, 284 A.2d 161, 166 (N.J. 1971). This authority is recognized as an exception to commerce clause limits on state powers when the state acts as a "guardian and trustee" of taxpayer resources. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438, 441 (1980).

One important measure of public morality is IHRL, defining a body of international standards binding the United States. It constitutes "those benefits deemed essential for individual well-being, dignity and fulfillment and

. . . a common sense of justice, fairness, and decency." Louis Henkin, The Age of Rights 2 (1996). It is clear that standards of public morality may be contravened by international trade that brings products made under morally abhorrent circumstances into the state of Massachusetts, displacing other products and enabling repressive governments to continue to violate rights with impunity. Under the Court of Appeals decision, Massachusetts might exclude products of local labor or rights abusers from state purchase, but would be forced to purchase products created under patently worse conditions abroad. Massachusetts citizens must be allowed to choose whether their purchasing dollars should support slave labor conditions in Burma, just as they choose to exclude local producers who fail to meet local standards of integrity and public morality.

Such a standard is clearly offended by the human rights abuses of the current government in Burma. For more than ten years, the Burmese military regime has consistently committed gross human rights violations. The government "killed thousands of civilians in seizing power, and has since killed, tortured, raped, imprisoned and forcibly relocated hundreds of thousands of Burmese people." Amnesty International, "Myanmar: 10th Anniversary of Military Repression," (August 7, 1998). U.S. government, UN and ILO reports document continuing violations including forced labor, suppression of a democratically elected government, and suppression of individual political rights. *See* U.S. State Department Report to Congress (June 13, 1997) 104-106; Appendix, 490-492.

Doing business in Burma inescapably supports the ability of the Burmese military regime to maintain this abuse of human rights. Most sectors of the economy depend upon an infrastructure that has been built with forced

labor. *See* U.S. Department of Labor, *Report on Labor Practices in Burma* (Sept. 1998) at 4. International commeree with companies owned or controlled by the Burmese military regime, direct business relations with the regime, and virtually all trade with Burma contribute to the continuation of human rights violations by providing support for the government's balance of payments, which is directly connected with military expenditures by the Burmese military regime for purposes of domestic suppression. *See* U.S. Embassy, Rangoon, *Foreign Economic Trends Report—Burma* (1997) at 15-16. The Massachusetts Burma Law is a legitimate response to the connection between doing business in Burma and the ability of the Burmese military regime to commit human rights violations.

C. International Human Rights Conventions, Adopted Into U.S. Law by Ratification, Reserve Substantial Responsibility for Enforcement of Human Rights Norms to the States

The United States has reserved large segments of international human rights enforcement to the states. Cognizant of the goals of the IHRL conventions and their place in fulfilling the purpose of the United Nations and the ILO, Congress has knowingly granted authority to the states to act with extraterritorial effect.

To this end, Congress has ratified Convention No. 105 on Forced Labor, the CAT, and the International Covenant on Civil and Political Rights (ICCPR). Within each of these conventions, not only has Congress committed itself to a long standing obligation to suppress slavery and forced labor, it has explicitly reserved to the states an enforcement role.

The Constitution of the ILO (Art. 19.7), overseeing Convention No. 105 on Forced Labor (instructing mem-

ber States to suppress and not to make any use of forced or compulsory labor like that currently practiced in Burma), contains a federalism clause that defers to the authority of subnational governments, including states. Constitution of the International Labour Organization, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35, *amended by* 7 U.S.T. 245, T.I.A.S. No. 3500, 191 U.N.T.S. 143 (1953), 14 U.S.T. 1039, T.I.A.S. No. 5041, 466 U.N.T.S. (1962), U.S.T. 3253, T.I.A.S. No. 7987 (1972). The role of the states in the application of conventions is also important.[1]

A federalist reservation was included when the U.S. Senate ratified both the CAT (prohibiting acts of torture and cruel, inhuman or degrading treatment or punishment *at home or abroad*) and the ICCPR (obligating signatories to respect and ensure the enumerated rights to all individuals without regard to status and to adopt legislation to put into effect these rights and their remedies). The ICCPR reservation on federalism (similar to that adopted for the CAT) states:

> That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments.

Understanding No. 5, 138 Cong. Rec. S4784 (1992).

[1] U.S. Representative to the ILO, Philip M. Kaiser, explained the meaning of the ILO Constitution's federalism clause:

> Where, in a country with a federal government like our own, it is decided that the subject of a convention comes under the jurisdiction of the constituent states *as well as* the federal authority, that particular convention is treated like a recommendation. It is referred to the states for such action as they care to take . . . .

Hearing, Subcommittee on Labor and Public Welfare on S.J. Res. 117, 84th Cong., 2d Sess. (1956) (Statement of Asst. Secretary of Labor Philip M. Kaiser).

Clearly, the obligation to implement these two conventions, one to suppress torture and forced labor, the other to enforce protection of basic human rights, was explicitly left in part to the states.

D. Customary International Law (CIL), as Part of the Federal Common Law, Provides Further Authority for State Legislation Intended to Promote Universal Respect for Human Rights and Suppress Its Violations

Since 1900, it has been accepted that CIL forms an integral part of U.S. law. *The Paquete Habana*, 175 U.S. 677 (1900). This Court approved the inclusion of CIL within the definition of the law of nations, stating that CIL should be used by courts:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. *Id.* at 700.

The American Law Institute's Third Restatement of Foreign Relations Law (Restatement), explains that CIL "results from a general and consistent practice of states followed by them from a sense of obligation" and is also created by international agreements "when such agreements are intended for adherence by states generally". Restatement (Third) of Foreign Relations Law § 102 (1987).

Violations of CIL as applied in the United States include "slavery or slave trade," "torture or other cruel, inhuman or degrading treatment or punishment," and "a consistent pattern of gross violations of internationally

recognized human rights." Restatement (Third) of Foreign Relations Law § 102 (1987). All of these violations have been documented in Burma, and are legitimated and supported by continued U.S. economic involvement with the illegitimate ruling regime. Thus, the United States has a *duty* to respond to these violations of CIL by appropriate means including shaping "its trade, aid or other national policies so as to dissociate itself from the violating state or to influence that state to discontinue the violations". Restatement (Third) of Foreign Relations Law § 702, cmt. o (1987).

It is perfectly legitimate for a state to act upon CIL as translated into U.S. law. As CIL develops, it becomes part of federal common law. In *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995), the court states that "it is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law." *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (citing *The Paquete Habana*, 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *Trajano v. Marcos* (Marcos Estate I), 978 F.2d 493, 502 (9th Cir.), *cert. denied*, 508 U.S. 972 (1993); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

Accordingly, states may legislate in a manner consistent with federal common law. Indeed, in other contexts, including ERISA and labor law, courts have relied on state law to inform and interpret federal common law. *Negoski v. Country Life Ins. Co.*, 843 F.Supp. 372 (N.D. Ill. 1993). *See also Fox Valley and Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir.), *cert. denied*, 498 U.S. 820 (1990); *Nash v. Trustees of Boston University*, 946 F.2d 960 (1st Cir. 1991) (*citing*

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957)). The court's deference to state law is particularly significant given the federal preemption present in both ERISA and labor law. Thus, as the Massachusetts Burma statute is consistent with CIL and federal common law, it should be viewed as contributing to, rather than contradicting, federal law.

E. The First Circuit Court of Appeals Was Unduly Influenced by the European Union in Its Consideration of International Law; a Full Consideration of U.S. Obligations Cannot Be Limited to One Treaty

The First Circuit Court of Appeals cited the opinion of a European Union official that the Massachusetts Burma Law is "an attack on international law." However, the "international law" referred to, the World Trade Organization (WTO) Government Procurement Agreement, is but one component of a complex and well-developed body of law. Further, WTO implementing legislation unambiguously prohibits private causes of action such as the National Foreign Trade Council (NFTC) challenge to the Massachusetts Burma Law that are related to the alleged inconsistency of a state law with WTO rules. Uruguay Round Agreements Act of 1994 (URAA). P.L. 103-465, § 102; 19 U.S.C. § 3512.

As argued in Section A, *supra*, if considered within the context of a complete collection of instruments that comprise IHRL, the Court should find U.S. obligations broad and inclusive. These instruments require all levels of the U.S. government to respect and protect the rights enumerated therein.

II. THE COURT OF APPEALS' DECISION UNDERMINES TRADITION OF STATES' INVOLVEMENT IN LEGISLATING TO PROMOTE HUMAN RIGHTS, DATING BACK TO STATE PROHIBITION OF THE SLAVE TRADE

The Decision of the Court of Appeals undermines a long tradition of state activism at the juncture of international trade and human rights. From the abolition of the slave trade to apartheid in South Africa, a rich tradition of state activism has helped give voice to citizen concern and indeed, shaped domestic and foreign policy. When the drafters of the Constitution agreed to bar federal legislation to ban the slave trade (until 1808), there was no implication that states would have to follow suit. U.S. CONST. art. I, § 9, cl.1. In fact, the authors of the Federalist Papers pleaded with the states to take action during that period. Despite the absence of federal legislation, the practice of slavery "may be totally abolished," wrote James Madison, "by a concurrence of the Few States which continue the unnatural traffic, in the prohibitory example which has been given so great a majority of the Union." THE FEDERALIST 43 (James Madison).

Economic boycotts have been a traditional method adopted by states and municipalities to convey the sentiments of the population since the Boston Tea Party. *See* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. Pa. L. Rev. 287 (citing colonial boycotts used to oppose British rule); Charles McLean Andrews, *The Boston Merchants and the Non-importation Movement* (1968). *See further* Briefs for Petitioner, *NAACP v. Claibourne Hardware Co.*, 458 U.S. 886 (1982) (describing boycotts as historically significant), *as cited in* Matthew Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l Law at 41 (1999).

This tradition of activism on the local and state level continues as a hallmark of American political involvement. As the Court of Appeals notes, at least 19 municipal governments have enacted analogous laws restricting purchases from companies that do business in Burma. Other jurisdictions have enacted similar laws relating to China, Cuba, Nigeria, and other nations. *National Foreign Trade Council v. Andrew S. Natsios et al.*, 181 F.3d 38, 47 (1st Cir., June 22, 1999).

State procurement limits or divestment have been adopted to influence other foreign issues, including perceived employment discrimination against the Catholic minority in primarily Protestant Northern Ireland. Fourteen states, including Connecticut, Massachusetts, New Jersey, New York, and Rhode Island, and 34 cities have enacted advisory or mandatory divestment laws directed towards firms that have business relationships with Northern Ireland. Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw. J. Int'l L. & Bus. 563, 568-569 (Spring 1993).

Indeed, Massachusetts approved a restriction on investment in firms that sell weapons or munitions that are used in Northern Ireland. An Act Terminating the Investment of Public Pension Funds in Firms Contributing to the Oppression in Northern Ireland, Mass. Gen. Laws, Ann. Ch. 32, § 23(1)(d)(iii), *approved* April 4, 1983.

Divestment in South Africa was spearheaded by state and local jurisdictions for nearly two decades in express disagreement with the stated federal policy of constructive engagement. In the end, however, it culminated in the federal Comprehensive Anti-Apartheid Act of 1986. By the fall of 1985, divestment bills had been enacted by 19 states and 62 cities and counties. Kevin P. Lewis, *Dealing With South Africa: The Constitutionality of State*

and Local Divestment Legislation, 61 Tul. L. Rev. 469, 471-472 (February 1987).

Placing these issues within a constitutional framework, Professor Laurence Tribe of Harvard Law School addressed the U.S. Senate on this matter, stating that although U.S. foreign policy is constitutionally reserved to the federal government, "it is equally fundamental that states and their public subdivisions are assigned the responsibility, under our Constitution, of deciding where and how to invest the public resources they collect through taxing and other sovereign measures." Absent a Congressional choice to "displace this historically localized responsibility" of states, Tribe explains, "[T]here is nothing in federal constitutional law that could conceivably support taking from state legislatures and municipal authorities this basic control over their own economic destinies." 132 Cong. Rec. S12533, *supra*.

III. THE COURT OF APPEALS DECISION PLACES THE CONSTITUTIONALITY OF MANY STATE AND LOCAL LAWS IN DOUBT, AND MAY LEAD TO A DRAMATIC INCREASE IN INAPPROPRIATE LEGAL CHALLENGES

A. The Court of Appeals Decision That Selective Purchasing Laws Are Unconstitutional Is an Important Question of Federal Law Because of the Large Number of State and Local Selective Purchasing Laws That Could Be Affected

The Court of Appeals decision could result in commerce clause and foreign affairs challenges to a wide variety of state and local procurement laws. This is because the First Circuit rejected the Massachusetts assertion that the Burma Law involves the state's power to act as a market participant, rather than as a market regulator, and thus is not subject to the limitations of the foreign commerce clause or the federal foreign affairs power. *See*

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit ("Pet. App.") at 36-38, 48-50.

As the Court of Appeals noted, many jurisdictions have selective purchasing laws similar to the Massachusetts law that restrict their procurement of goods and services from companies that do business in countries that suppress democracy and violate human rights. *See* Pet. App. at 10. In addition to procurement measures intended to express support for democracy and human rights, numerous municipalities and 48 states have adopted at least one environmental procurement preference that could be challenged under the Court of Appeals' reasoning.[2] The 48 state environmental purchasing preferences include: 34 states with preferences for recycled materials generally,[3] 20

---

[2] As with the Massachusetts Burma law, foreign governments have suggested that environmental procurement preferences constitute trade barriers. *See* European Commission, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT at 2 and 18-19 (Brussels, Oct. 1998); Department of Foreign Affairs and International Trade, REGISTER OF UNITED STATES BARRIERS TO TRADE at 14 (Ottawa, Jan. 1999); Ministry of International Trade & Investment, 1998 REPORT ON THE WTO CONSISTENCY OF TRADE POLICIES BY MAJOR TRADING PARTNERS (Japan 1998).

[3] Alaska Stat. § 36.30.337 (Michie 1998); Cal. Pub. Cont. Code § 12310 (West 1998); Del. Exec. Order 82 (1990); Fla. Stat. Ann. § 287.045 (West 1998); Haw. Rev. Stat. § 103D-1005 (1997); 415 Ill. Comp. Stat. 20/3 (West 1998); Ind. Code § 5-22-15-16 (Michie 1998); Iowa Code Ann. § 216B.3 (West 1997); Kan. Stat. Ann. § 75-3740b (1997); Ky. Rev. Stat. Ann. § 45A.520 (Banks-Baldwin 1998); La. Rev. Stat. Ann. § 30:2415 (West 1998); Me. Rev. Stat. Ann. tit. 5, § 1812 (West 1997) (recycled materials other than paper); Md. Code Ann., State Fin. & Proc. § 14-402 (1998); Minn. Stat. Ann. § 16B.121 (West 1998); Miss. Code Ann., § 49-31-7 (1998); Mo. Ann. Stat. § 34.031 (West 1997) (recycled solid waste materials); Mont. Code Ann. § 75-10-806 (1997); Neb. Rev. St. § 81-15,159 (Michie 1998); Nev. Rev. Stat. § 386.417 (1997); N.H. Rev. Stat. Ann. § 21-I:11 (1997); NM. Stat. Ann. § 13-I-135.1 (Michie 1998); N.Y. Pub Auth. Law § 2878-a (McKinney 1998);

states with separate purchasing preferences for recycled paper,[4] and several addressing other recycled materials.[5] Many local governments have also adopted procurement policies for products with recycled content, ranging from paper[6] to street signs[7] to playgrounds to park benches

N.C. Gen. Stat. § 130A-309.14 (1997); Ohio Rev. Code Ann. § 125.082 (West 1998); Okla. Stat. Ann. tit. 74, § 85.53 (West 1998); Or. Rev. Stat. § 279.570 (1997); R.I. Gen. Laws § 37-2-76 (1997); S.C. Code Ann. § 44-96-140 (1997) (recycled and recyclable materials); S.D. Codified Laws § 5-23-41 (Michie 1998); Tex. Health & Safety Code § 361.426 (West 1998); Vt. Stat. Ann. tit. 3, App. Ch. 7, Exec. Order 24-86 (recycled materials and nonwasteful packaging); Wash. Rev. Code Ann. § 43.19.A.005 (West 1998) W. Va. Code § 20-11-7 (1998); Wis. Stat. Ann. § 16.72 (1998).

[4] Alaska Stat. § 36.30.333 (Michie 1998); Ariz. Rev. Stat. Ann. § 41-2533 (West 1998); Ark. Code Ann. § 19-11-260 (Michie 1998); Cal. Pub. Cont. Code § 12162 (West 1998); Cal. Educ. Code § 32373 (West 1999) (educational agencies); Colo. Rev. Stat. Ann. § 24-103-207 (West 1998); Conn. Gen. Stat. Ann. § 4a-67a (West 1998); Ga. Code Ann. § 50-5-60.2 (Michie 1998); Me. Rev. Stat. Ann. tit. 5, § 1812-B (West 1997); Mass. Gen. Laws Ann. ch. 7 § 22 (West 1998); Mich. Comp. Laws Ann. § 18.1261b (West 1998); Minn. Stat. Ann. § 16B.122 (West 1998); N.J. Stat Ann. § 13:1E-99.27 (1998); N.D. Cent. Code § 54-44.4-08 (1997); Or. Rev. Stat. § 279.630 (1997) (recycled and recyclable); 53 Pa. Cons. Stat. § 4000.1511 (1999); S.D. Codified Laws 5-23-22.4 (Michie 1998); Tenn. Code Ann. § 68-211-606 (1998); Tex. Gov't Code Ann. § 2155.446 (West 1998); Utah Code Ann. § 63-56-20.7; Va. Code Ann. § 11-47.2.

[5] *E.g.*, Colo. Rev. Stat. Ann. § 8-19.5-101 (West 1998) (plastics); Conn. Gen. Stat. Ann. § 4b-51a (West 1998) (construction materials); Idaho Code § 40-707 (1998) (highway construction and maintenance); 58 Pa. Cons. Stat. § 479 (1999) (oil products); Tex. Gov't Code Ann., § 2155.447 (West 1998) (oil products).

[6] *E.g.*, D.C. Code Ann. § 6-3413 (1998); N.Y.C. Admin. Code § 6-122 (1998); City of Richmond Code (Virginia) § 22-4 (1993).

[7] Columbus, Ohio has an ordinance requiring street signs to be made from recycled materials. Eleanor Lewis & Eric Weltman, *Government Buying Can Save Tax Dollars and the Environment*, Int'l City-County Mgmt. Ass'n, Feb. 1993, at 2.

and fences,[8] to ordinances creating a general preference for recycled materials.[9] Other environmental procurement measures at the state and local level aim to reduce dependence on petroleum-based products. These include nine states with price preferences for soybean-based ink,[10] five states with statutes requiring bio-based or clean alternative fuel for governmental motorized vehicles,[11] and a variety of statutes and ordinances requiring energy efficiency to be taken into account in procurement decisions.[12]

[8] Chicago recently adopted an ordinance with a purchasing preference for playgrounds, park benches and fences made from recycled plastic. Alice Horrigan, *Choosing to Recycle—Because it Pays*, E, Mar. 13, 1997.

[9] *E.g.*, Baltimore County Code § 15-91 (1988); Itasca County, Minnesota, *see* Lewis & Weltman, *supra*, King County, Washington, *see* Richard Keller, *Buying Recycled: Investing Dollars to Close the Loop*, World Wastes, Jan. 1994; City of Los Angeles Admin. Code, art. 6, § 10.32 (1998); Newark, New Jersey, *see* Lewis & Weltman, *supra*.

[10] Ark. Code Ann. § 19-11-102 (Michie 1998); 30 Ill. Comp. Stat. 500/45-15 (West 1998); 50 Ill. Comp. Stat. 520/10 (West 1998) (local government purchases and contracts); Ind. Code § 5-22-15-18 (1998); Iowa Code Ann. § 216B.3 (West 1998); Ky. Rev. Stat. Ann. § 57.035 (Banks-Baldwin 1997); Minn. Stat. Ann. § 16B.121 (West 1998); Mo. Ann. Stat. § 34.175 (West 1997); N.D. Cent. Code § 54-44.4-07 (1997); S.D. Codified Laws § 5-23-37 (Michie 1998). Iowa also has a preference for soybean-based hydraulic fluids. Iowa Code Ann. § 307.21 (West 1998).

[11] Cal. Eduuc. Code § 17911.5 (West 1998) (clean fuel school buses); Conn. Gen. Stat. Ann. § 4a-59 (West 1998) (clean alternative fuel); Ind. Code § 5-22-15-19 (1998) (soy diesel, bio-diesel); Iowa Code Ann. § 18.18 (West 1997) (minimum ethanol requirements and alternative methods of propulsion); Wash. Rev. Code Ann. § 43.19.637 (West 1998) (clean fuel motorized vehicles).

[12] The statutes include Ariz. Rev. Stat. Ann. § 34-455 (buildings) (West 1998); Conn. Gen. Stat. Ann. § 16a-38 (West 1998) (lifecycle cost analyses in major capital projects); Minn. Stat. Ann. § 216C.19 (West 1998) (roadway lighting; N.H. Rev. Stat. Ann. § 21-I:19-a (1997) (buildings); Or. Rev. Stat. § 276.915 (1997); Tex. Gov't Code Ann. § 2166.403 (1999); Vt. Stat. Ann. tit. 3 § 2291

Another type of state and local environmental procurement policy is a limit on tropical hardwood purchases. To date, three states and nine cities have passed laws that limit the purchase of wood from tropical rainforests, only buying tropical timber that is harvested using ecologically sound management practices.[13]

In addition to environmental objectives, local governments have also used their purchasing power to promote fair labor practices. Dozens of cities and counties—including Pittsburgh, Cleveland, and San Francisco—have laws banning the procurement of products made in sweatshops.[14] Similarly, nearly two dozen cities require com-

(1998); Wis. Stat. § 16.847 (1998). New York City requires government purchases of motor vehicles to be low emissions vehicles. N.Y.C. Admin. Code § 6-121 (1998). Auustin, Texas has a purchasing preference for solar electric systems, *see* Lewis & Weltman, *supra*, while San Jose, CA requires streetlights to be energy efficient, and Phoenix, Arizona requires energy efficiency in all municipal building lighting, *see id.*

[13] Ariz. Rev. Stat. Ann. § 34-201 (West 1998); N.Y. State Fin. Law § 165 (McKinney 1998); Tenn. Code Ann. § 4-3-1112 (1998); Baltimore, Maryland, Ord. No. 635 (passed 1991), *see* John Javna, *Now let's remind your rep: Rally behind recycling bill*, Atlanta J. and Atlanta Const. Mar. 24, 1991, *available in* 1991 WL 7779914; Bellingham, Washington, Resolution No. 43-90 (passed Aug. 1990); Berkeley, California (tropical hardwoods, redwoods) (Renee Koury, *Endangered Timber Banned in Berkeley*, L.A. Daily News, Oct. 30, 1995, *available in* 1995 WL 5424835); Los Angeles, California, *see* Tracey Kaplan, *Children Get City to Bar Hardwoods*, L.A. Times, Oct. 9, 1991 *available in* 1991 WL 2221464; Long Beach, California, *see* "Tropical Timber Trade Restrictions," Rainforest Relief (Jan. 27, 1999 facsimile); San Francisco, Ordinance No. 391-90; Santa Clarita, California, *see* Kaplan, *supra*; Santa Monica (California) Mun. Code, ch. 2.28; Ventura, California, *see* Tina Daunt, *Ventura City Hall Joins Boycott of Hardwoods*, L.A. Times, Mar. 17, 1992, *available in* 1992 WL 2937933.

[14] *See* U.S. Newswire, *Pittsburgh Joins City Fight Against Sweatshops* (Sept. 23, 1998); Linda Himelstein, *Going Beyond City Limits? Municipalities Are Exercising Their Clout on Social Issues —And Business Is Balking*, Bus. Wk. (July 7, 1997).

panies receiving municipal contracts to pay their employees a "living wage."[15] All of these laws could be subject to challenge based upon the Court of Appeals' ruling that market participation measures are subject to the self-executing limits of the federal foreign affairs power and the foreign commerce clause.

B. The Court of Appeals' Reliance on the Complaints of Foreign Countries Presents an Important Question of Federal Law Because Foreign Countries Have Complained That a Wide Variety of State and Local Laws Constitute Trade Barriers

In addition to threatening state procurement laws, the Court of Appeals' reliance on complaints by foreign governments could provoke challenges to various other types of state law. The European Union (EU) has argued that numerous kinds of state law constitute trade barriers, including subsidies,[16] health and safety standards,[17] environmental standards[18] and taxation of multinational corporate income.[19] Based on EU trade reports and the World Trade Organization (WTO) provisions that they cite, a 1994 study identified 90 potential conflicts between WTO provisions and state law in California alone.[20] Canada has similarly complained about various categories of state law including state-level inspection requirements for goods

[15] Yumi Wilson, *S.F. Sets Up 15-Member Panel to Study Effect of Living-Wage Law*, S.F. Chron. A23 (Nov. 24, 1998) available at 1998 WL 3928728.

[16] *See* European Commission, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT at 23 (Brussels, Oct. 1998).

[17] *Id.* at 11.

[18] *Id.*

[19] *Id.* at 5.

[20] *See* Robert Stumberg, GATT IMPACT ON STATE LAW: CALIFORNIA (Center for Policy Alternatives, 1994).

and food safety,[21] licensing and taxation of alcoholic beverages,[22] and newsprint recycling requirements.[23]

Congress anticipated that state laws could be challenged as conflicting with trade agreements, and it specifically prohibited any party from asserting a private cause of action based upon such alleged conflicts. *See* Pet. App. at 26, *citing* 19 U.S.C. § 3512. Accordingly, the decision of the Court of Appeals should be reversed in order to prevent litigation challenging state laws on the grounds that they encroach upon federal power to regulate foreign affairs or foreign commerce because the laws are inconsistent with WTO trade agreements.

CONCLUSION

This Court should grant petitioner's writ of certiorari in order to affirm the rights of states to legislate in accordance with international human rights law and principles, and alleviate the uncertainties about existing laws and regulations created by the Appeals Court's decision.

Respectfully submitted,

DEBORAH ANKER
Counsel of Record
HARVARD IMMIGRATION &
REFUGEE CLINIC
197 Friend Street - Suite 800
Boston, MA 02114
(617) 371-1234

On the Brief,
PETER ROSENBLUM

October 20, 1999

---

21 *See* Department of Foreign Affairs and International Trade, REGISTER OF UNITED STATES BARRIERS TO TRADE at 13 (Ottawa, Jan. 1999).

22 *Id.* at 15.

23 *Id.*